SUPREME COURT
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IN THE

Supreme Court of the United States

October Term 1966

No. ~~1340~~ 124

ESTATE OF BETTY BERRY, Deceased,
LOUIS BERRY, Executor,
LOUIS BERRY, Surviving Spouse,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent,

LCG TRUST No. 2, A. R. GLANCY, JR., Successor Trustee,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 3, 1967.

OPINIONS BELOW

The opinion of the Tax Court of the United States is reported at 43 TC 723. The opinion of the Court of Appeals for the Sixth Circuit is reported at 372 F2d 476.

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were made and entered on February 3, 1967 and copies thereof are appended to this petition in the certified record on Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S. Code §1254(1).

QUESTION PRESENTED

This petition was occasioned by the inclusion of amounts in petitioners income allegedly representing interest rather than principal payments in connection with the installment sale of the Raleigh Hotel in Washington, D. C. in 1953 under a contract providing for a total purchase price of $3,240,000.00 without interest, but which included a prepaid discount schedule. The majority opinion of the Tax Court of the United States found that the purchase price included $440,000.00 of prepaid interest. The dissenting opinion of the Tax Court of the United States, written by Judge Mulroney, who heard the case, states that the majority opinion is clearly contrary to the many holdings of this and other courts, all to the effect that an installment sale contract that does not provide for interest on deferred payments cannot be construed as involving the payment of

interest. The United States Court of Appeals for the Sixth Circuit affirmed the majority opinion. The question presented is whether interest may be deducted by the purchaser or charged to the seller, when the contract of sale expressly provides for no interest.

STATEMENT

The basic facts which are not in dispute are as follows:

The Petitioners in Docket No. 16,781 are the Estate of Betty Berry, Deceased, Louis Berry, Executor, and Louis Berry, surviving spouse, with offices at 3500 David Stott Building, Detroit, Michigan 48226 (Par. 1, page 122a of Appellants' Appendix as filed in the U. S. Court of Appeals for the 6th Circuit, hereinafter referred to as "App.")

For the taxable years 1955 through 1957, Betty Berry and Louis Berry filed joint Federal Income Tax returns with the District Director, Detroit, Michigan (Par. 1, App. 122a).

The Petitioner in Docket No. 16,782 is a trust created under a Declaration of Trust dated November 1, 1944, and during the years in issue was a partner of the G.B.M. Company. A. R. Glancy, Jr., has acted as Successor Trustee with his principal office at 418 Ford Building, Detroit, Michigan 48226 (Par. 2, App. 122a).

The Federal Income Tax returns of the trust for the taxable years ending October 31, 1955, October 31, 1956, and October 31, 1957 were filed with the District Director of Internal Revenue, Detroit, Michigan (Par. 2, App. 122a).

In 1953, the G.B.M. Company, a co-partnership, was the owner of the Raleigh Hotel in Washington, D. C. The members of the partnership were Louis

Berry, Peter A. Miller, the I.C.G. Trust No. 2, and the Glancy Hospital Trust, all of the City of Detroit, State of Michigan (App. 61a).

G.B.M. Company did not operate the Raleigh Hotel, but leased it to a co-partnership doing business under the name and style of the Hotel Raleigh (App. 61a).

Throughout the early fall of 1953, the interest of G.B.M. Company in the Raleigh Hotel was not for sale. In fact, Berry never authorized anyone to offer the Raleigh Hotel property for sale (App. 62a).

Prior to October 17, 1953, Berry had no dealings with R. C. Nordblom and Company, real estate brokers of Boston, Massachusetts, with respect to the Raleigh Hotel, even though Nordblom on September 1, 1953, at the request of Joseph Massaglia, Jr., forwarded to Palmer Johnson (Massaglia's attorney) a contract to purchase the Raleigh Hotel (App. 62, Exhibit 7G).

Although Massaglia had requested Nordblom to draw up a contract to purchase the Raleigh Hotel, Berry had not been advised that Massaglia was interested in purchasing the G.B.M. Company's interest in the Raleigh Hotel as of this time (App. 62a). Berry never saw this letter or contract of September ., 1953 (App. 70a).

It was not until later in the fall of 1953 that Berry learned of Massaglia's interest in purchasing the hotel, and he learned of this interest through Peter A. Miller who was acting as co-broker with R .C. Nordblom and Company (App. 62a).

On or about October 15, 1953, Massaglia, through his attorney, Johnson, communicated his first offer to the Petitioners (Exhibit 14, App. 227a).

This first offer was communicated through Miller who informed Berry of Massaglia's interest in purchasing the Raleigh Hotel (App. 61a-63a).

Berry discussed this offer with Glancy and on Berry's recommendation, to which Glancy agreed, the offer was rejected (App. 63a).

After the rejection of the Massaglia offer of October 15, 1953, Miller asked Berry what offer would be acceptable. Berry replied that although the hotel property was not for sale, Petitioners would entertain offers if they came in, but that any offer would have to be substantially more than the rejected offer before Petitioners would accept it (App. 63a).

In possibly a week later, Miller asked Berry if he would accept $100,000.00 more, or possibly $200,000.00 more, which was also rejected by Berry (App. 64a).

After the submission of Massaglia's offer of October 15, 1953, Miller advised Johnson, Massaglia's attorney, that the offer was not acceptable to Petitioners, and that they would only sell at a price of $3,240,000.00, without interest (App. 93a). Johnson told Miller that Massaglia was not willing to offer $3,240,000.00, without interest, because if the note were paid before maturity, he would be penalized (App. 93a). A prepayment discount schedule was suggested by Miller (App. 93a). Johnson was satisfied with the schedule and accepted it (App. 93a).

The prepayment discount schedule had no bearing on the price that was asked and negotiated for by Petitioners (App. 71a). It was included as an inducement for prepayment (App. 71a). It did not influence Petitioners' consideration of the transaction, because prepayment was a remote possibility (App. 71a). In addition, in the event of default, the entire balance became due without discount (Exh. 10J, App. 207a). Discounts for prepayment are not unusual in the real estate business App. 72a). The prepayment privilege was not related to the interest problem (App 72a).

It was more advantageous to Massaglia to claim $440,000.00 as interest than to include it in the purchase price (App. 99a). Massaglia intended to deduct $440,000.00 as interest at the time he signed the contract with Petitioners (App. 99a). Johnson did not advise Miller or anyone else of his intention to do so (App. 99a). Miller told Johnson that Petitioners would not sell unless the price were $3,240,000.00, without interest (App. 101a).

After Johnson and Miller agreed to the $3,240,000.00 price, without interest, Berry turned Massaglia's offer over to Mr. David Miro, Berry's attorney, and Berry told Miro to redraft the agreement or prepare a new agreement in accordance with Berry's understanding of the deal (App. 64a; Exh. 14, App. 227a).

Pursuant to Berry's instructions, Miro redrafted the document on the 16th or 17th of October, and the document was completed and dated on October 17, 1953 (Exh. 9-I, App. 75a).

Following its preparation, Miro and Miller took the document to the home of Mr. Alfred Glancy, Jr., on October 17, 1953, and there the document was executed by Glancy on behalf of L.C.G. Trust No. 2, and on behalf of the Glancy Hospital Trust (App. 76a). Miller also signed the document at this time (App. 76a).

After signing of the document, Miro gave Miller the following documents: first, the offer of Massaglia to buy, containing the acceptance of Miller and Glancy (Exh. 9-I): second, a memorandum of sale regarding the partnership and G.B.M. Company covering the leasehold interest; third, an option in connection with the outstanding stock of the operating company which held the liquor license; fourth, a certified copy of the trust deed that was a first mortgage indenture with the National Life Insurance Company; and fifth, a copy of two notes which

were the basis of the mortgage debt, each in a base amount of $725,000.00. Miro told Miller to deliver these documents to Berry for his approval (App. 78a).

Before Exhibit 9-I could be executed, it was necessary to arrive at an understanding with the owners of the operating lease on the Hotel Raleigh (App. 78a). Therefore, the G.B.M. Company had to buy back the lease in order to be in a position to sell the hotel (App. 67a).

In addition, it was necessary to work out a commission arrangement with Miller and Nordblom before the deal could be completed (App. 67a). On November 30, 1953, Berry wrote Nordblom concerning the commission agreement (App. 68a). On December 2, 1953, Nordblom confirmed the final commission arrangements in connection with the sale (App. 69a, Exh. 17).

Following the signing of the offer to purchase by Miller and Glancy, Miller took the offer to purchase to California with him to obtain Massaglia's signature. Johnson, however, insisted upon certain conditions being made a part of the agreement prior to having his client, Massaglia, sign the agreement (App. 97a, Exh. 9-I).

Miller signed the supplemental letter on October 26, 1953, and it was made a part of the original agreement. Then on the same date, October 26, 1953, Massaglia signed the agreement to purchase in the presence of Johnson (App. 95a).

After obtaining Massaglia's signature, Miller returned the signed agreement to Berry. Berry then consulted with his attorney, Miro, concerning the conditions in the supplemental letter, signed by Miller on October 26, 1953 (App. 80a, Exh. 9-I). After having discussed the conditions with his attorney, Miro, Berry signed the acceptance on November 2, 1953 (App. 81a, Exh. 9-I).

On November 16, 1953, Massaglia assigned all of his right, title and interest in the agreement to purchase to Raleigh Properties, Inc. (Exh. 11-K).

On its books, Raleigh Properties, Inc., entered the hotel properties at a cost of $2,800,000.00, and set up $440,000.00 as prepaid interest. Thereafter, Raleigh Properties, Inc., set up on its books each year, and claimed as a deduction in its returns, a proportional part of the $440,000.00 as an interest expense. Raleigh Properties, Inc., set up this amount as prepaid interest on the advice of Johnson, even though the Petitioners specifically bargained against interest, and even though Miller specifically told Johnson that there would be no deal if the buyer insisted upon an interest-bearing note (App. 101a).

The Internal Revenue Service audited the books of Raleigh Properties, Inc., for the taxable years 1954, 1955, and 1956, and disallowed the interest deduction. Raleigh Properties, Inc., however, appealed to the Tax Court and the Tax Court held that Raleigh Properties, Inc., was entitled to an interest deduction (App. 5a-23a).

Petitioners credited all payments from Massaglia to principal and none to interest (App. 82a). There were no notations or endorsements on any check of Raleigh Properties, Inc., to Petitioners directing the application of the payment represented by the check to either principal or interest, nor did Raleigh Properties, Inc., accompany any check with a letter of transmittal giving any directions (App. 86a).

On November 26, 1953, Massaglia submitted to Berry a press release which he wished Berry to release to the newspapers. The release stated that the purchase of the Raleigh Hotel was $4,000,000.00 (App. 70a, Exh. 18).

On May 29, 1962, Thomas Moore, comptroller of the G.B.M. Company, received a document from the Realty Title Insurance Company, Washington, D. C., stating that the Raleigh Hotel had been conveyed to Hamilton Properties, Inc. (App. 82a). Moore had been requested to confirm certain financial information for Hamilton Properties, Inc., prior to the sale; to be specific, on May 24, 1962, a telegram was sent by Moore to Mr. Joseph Fairfield of the Realty Title Insurance Company confirming the balance on the second mortgage, which at that time was $822,739.10 (App. 82a).

Following the purchase by Hamilton Properties, Inc., Moore continued to receive payments from them upon the Raleigh Properties, Inc., note, accompanied by a transmittal letter (App. 83a, Exh. 19). However, Moore never received any instructions from Hamilton Properties, Inc., to apply any payment on interest (App. 84a).

The Internal Revenue Service audited the returns of the G.B.M. partnership for the taxable years 1954, 1955, 1956 and 1957, and held that $440,000.00 of the profit represented interest, and therefore, was taxable as ordinary income under the provisions of Section 61 (a) (4) of the Internal Revenue Code of 1954, as amended. In accordance with the Internal Revenue's audit of the G.B.M. partnership, the Petitioners, each a partner in the G.B.M. Company, were taxed on their distributive share of the ordinary income.

The Petitioners disagreed with the findings of the Internal Revenue Service and filed Petitions to the Tax Court on November 16, 1960, in the case of L.C.G. Trust No. 2, A. R. Glancy, Jr., Successor Trustee, Docket No. 89,963; on October 31, 1960 in the Estate of Betty Berry, Deceased, Louis Berry Executor, Louis Berry, Surviving Spouse, Docket No. 89,806.

Both of the above named cases were consolidated for trial on April 8, 1964 and the trial was held before the Honorable J. Mulroney on April 8, 1964 (App. 57a-103a).

On February 19, 1965 the above named cases were reassigned to the Honorable J. Gregory Bruce who heard and wrote the opinion in the case of Raleigh Properties, Inc., *supra.*

On April 20, 1965 the decision was entered holding that the stated purchase price of $3,240,000.00 included $440,000.00 of prepaid interest (App. 105a-121a).

The Petitioners disagreed with the findings of the Tax Court and filed a Petition for Review by the United States Court of Appeals for the Sixth Circuit on July 15, 1965 (App. 3a).

On appeal, the Sixth Circuit Court of Appeals affirmed the decision of the Tax Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court below involves a direct conflict with decisions of the Court of Appeals in the Fifth Circuit, *Daniel Bros. Co. v. Commissioner of Internal Revenue,* 28 F2d 761 (1928) and *Hundahl v. Commissioner of Internal Revenue,* 118 F2d 349 (1941). In those cases it was held that an installment sale contract that does not provide for interest on deferred payments cannot be construed as involving the payment of interest:

In *Hundahl, supra,* sustaining a prior BTA case, the Court would not permit the deduction of interest where the agreement did not require interest. A taxpayer purchased his divorced wife's interest in community property. The taxpayer and his attorney con-

sidered the present value of the property and interest at three and one-half (3½%) percent, during the term of the installments to arrive at the amount of the installment. The written agreement did not provide for interest; however, a discount of 5% compound interest was permissible at the end of five (5) years on the unpaid installments. The Court, in denying the taxpayers claimed interest deduction in the first year of the contract, said:

> ". . . No interest was paid or agreed to be paid. The written agreement required part of the purchase price to be paid in cash and the balance in fixed future installments. It did not matter how the Petitioner in his own mind or in discussions with his attorney arrived at the amount he would agree to pay . . . ."

As the agreement was worded, there was no interest and all was principal. The provision for discount in case of his death or after five years did not alter this, but emphasized it. If interest were running, the provision would not be for a discount, but one to pay principal and stop interest. Each installment paid is a capital investment.

As to the interpretation of our written agreement, this is precisely the case. There is no interest provided for during the entire term of the installments. In order to obtain the discount, the vendee must pay the entire principal. Interest cannot be discount, nor any discount be interest. These are separate and distinct provisions operative only under specific conditions and controlled by the terms of the written document.

Daniel Brothers Company v. Commissioner, 28 Fed. 2d 761 (1928) is pertinent to any discussion of discount. In it the Court held that payments made as purchase-money installments on a contract for the purchase of real estate are not payments of interest which may be deducted in ascertaining the net

income under the provisions of the Income Tax Law for the deduction of interest paid on indebtedness, and state:

> ". . . Under the transaction between the petitioner and the seller of the property dealt with, petitioner did not receive or have the use of any money of the seller prior to an installment of the price becoming due. Petitioners' promise to pay stated installments of the purchase price were not promises to pay money which the seller owned or would be entitled to prior to the installment becoming payable. Before the installments were payable, petitioner did not use or withhold any money to which the seller was entitled. An obligation to pay the agreed price of property in installments falling due in the future cannot properly be regarded as including an obligation to pay interest. There would be an obvious lack of plausibility in a contention that, in the case of any contract of sale under which the agreed price is payable, not when the sale take effect but thereafter, the buyer's compliance with his obligation to pay the agreed price involves the payment of interest. To sustain such a contention would amount to saying that, under the quoted provisions of the statute, every credit purchase of property by the taxpayer gives rise to a right to a deduction for interest paid or accrued, on the theory that the credit price includes what the cash price would have been and interest on the amount of a cash price . . . ."

The foregoing analysis of credit transactions is not materially different from the explanation of Berry in this case when questioned concerning the discount schedule.

Petitioners had the right to bargain for a no interest transaction, and they in fact bargained for and obtained a no interest installment payment transaction. To charge Petitioners with a portion of the purchase price as interest

after they had refused to sell to Massaglia on an installment basis with interest solely because of the inclusion of a discount schedule is to force upon Petitioners a contract which they flatly and unequivocally rejected.

We respectfully submit there is no legal or factual basis for so doing.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1349

ESTATE OF BETTY BERRY, DECEASED, LOUIS BERRY, EXECUTOR, LOUIS BERRY, SURVIVING SPOUSE, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

LCG TRUST NO. 2, A. R. GLANCY, JR., SUCCESSOR TRUSTEE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The only issue presented here is whether the Tax Court properly characterized as interest and therefore ordinary income a part of deferred installment payments that petitioners received as the sellers[1] of the Raleigh Hotel in Washington, D.C. The Tax Court

[1] Petitioners in addition include the estate of the deceased wife of one of the sellers, a party by reason of the filing of joint returns. In this memorandum "petitioners" refer only to the sellers.

265-042—67

rejected petitioners' contention that the deferred payments were entirely payments of principal and therefore capital gain (R. 114a–117a).[1] The court of appeals affirmed (Pet. 14–15).

The decisions below are correct, and there is no conflict among the circuits. An amendment to the Internal Revenue Code, adopted in 1964, resolves the issue in dispute for the future, thus eliminating any possible future significance of this case.

Negotiations for the sale of the hotel began with an offer to purchase the property for $2,800,000, on terms that called for a down payment, plus a deferred payment mortgage bearing interest at an annual rate of 4½ percent. The interest would have totalled $440,000 over the full term of the note. Petitioners countered that they would sell only at a price of $3,240,000, the sum of the purchase price and interest offered, and that the note should be made non-interest bearing. They at the same time observed that the demanded increase in price would approximately equal the interest provided for in the original offer (R. 107a–108a).

The purchaser objected on the ground that any prepayments of the debt would be penalized to the extent of such interest as would not have accrued under the terms of the initial offer. Petitioners then offered to apply a schedule of discounts in the event of prepayment. The discounts decreased with time in a manner that roughly paralleled the interest that would have been saved by prepayment under the original offer (R. 108a–109a).

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[1] "R." references are to the appendix to the brief for the appellants filed in the court of appeals.

The purchaser accepted. Following the transfer of the property, it treated $440,000 of the deferred payments as interest, and claimed deductions for them as paid. Petitioners, on the other hand, treated the same amounts as payments of principal, and claimed the preferential tax rates accorded capital gains (R. 113a).

The Commissioner, in order to protect the revenue, disallowed both claims. In a companion case brought by the purchaser, the Tax Court rejected the Commissioner's position that the payments were capital in nature, and sustained the purchaser's treatment of the $440,000 as an interest expense. *Raleigh Properties, Inc.* v. *Commissioner*, 1962 P-H Tax Ct. Mem. ¶ 62,150, reprinted at R. 5a. The present case was brought by petitioners to test their position that the payments included no such interest.

This Court has made clear that the substance of a transaction must govern its tax consequences. "[T]he transaction must be viewed as a whole, and each step, from the commencement of negotiations to the consummation of the sale, is relevant. * * * [T]o permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress." *Commissioner* v. *Court Holding Co.*, 324 U.S. 331, 334.

The transaction here at issue was in every material respect indistinguishable from one based upon a note expressly calling for interest. The entire tenor of the negotiations demonstrated that the purchasers wanted an interest-bearing transaction, the sellers acquiesced,

and the ultimate agreement contemplated interest, even though the word "interest" was not used in the documents.

Petitioners err in asserting a conflict between the decision below and those of the Fifth Circuit in *Daniel Bros.* v. *Commissioner*, 28 F. 2d 761, and *Hundahl* v. *Commissioner*, 118 F. 2d 349 (Pet. 10–12). In *Daniel* the taxpayer was entitled to a discount on prepayment of a deferred obligation only after the required periodic payments had been made for 6 years; in *Hundahl* the taxpayer was entitled to a prepayment discount only in the event of his death, or after paying for 5 years. Thus in neither case could a fair parallel be drawn to a transaction bearing interest at a set annual rate.

Congress has in any event resolved the question for the future by adding Section 483 to the Code. That provision, adopted in 1964,* requires the Commissioner to impute a reasonable rate of interest to any deferred payment transaction that on its face provides for no interest or interest at an unreasonably low rate.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1967.

* Revenue Act of 1964, P.L. 88-272, 78 Stat. 19, Sec. 224(a).

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PETITION FOR REHEARING

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING

The petitioners respectfully petition this Honorable Court for a rehearing of the decision denying their petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit in the above entitled cause, and in support of this petition represent to the Court as follows:

The Fifth Amendment to the Constitution of the United States provides that no person shall "be deprived of life, liberty or property without due process of law". One of the rights guaranteed to every person by this amendment is the right to have disputes in which he is involved decided by a fair and impartial tribunal. This right has been recognized in a number of decided cases. One of these cases states:

> One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case. *Knapp v. Kinsey,* 232 F.2d 458 at 465 (CA 6, 1956).

Nor is such a right limited to the Courts established by the constitution, rather it extends to statutorily established courts and administrative tribunals.

> . . . a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trial be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. *N.L.R.B. v. Phelps, et al.,* 136 F.2d 562 at 563 (CA 5, 1943).

One of the aspects of the right to a fair hearing before a fair tribunal is that the trier of the facts must listen to the testimony and evidence introduced at the hearing with an open mind, and must not form an opinion until all of the evidence has been received. As one court stated:

> . . . a judgment, decision or determination by a judge or chancellor prior to a hearing of all the evidence amounts to a deprivation of property without due process. *Rosenberg v. Baum,* 153 F.2d 10 at 16 (CA 10, 1946).

Judge Bruce, who wrote the majority opinion in the case at bar, heard and decided the related case of *Raleigh Properties, Inc. v. The Commissioner.* In both cases, the issue is the factual determination of what the intention of the parties to a real estate transaction was regarding interest. In *Raleigh Properties,* the taxpayer claimed that $440,000.00 of the purchase price represented prepaid interest. After hearing all of the testimony, Judge Bruce decided that the evidence showed that the parties to the sale intended that the amount should be interest.

In the instant case, the sellers of the property contend that no part of the purchase price was intended to be interest. Judge Mulroney, after hearing all the testimony decided that the evidence showed that the parties did not intend any part of the purchase price should be interest. However, Judge Bruce wrote an opinion that the decision in *Raleigh Properties* required a decision against the taxpayer in this case. His opinion was accepted by a majority of the Court, and was affirmed *per curiam,* by the Court of Appeals for the Sixth Circuit, which accepted his factual determination without question.

The Tax Court of the United States is a trial Court rather than an appellate court. As a trial court it is charged with the responsibility of making factual determinations. These factual determinations should be made by that judge who has had the opportunity to observe the demeanor of the witnesses as they testify. These factual determinations should not be made by one who has not had an opportunity to observe the witnesses; nor should a judge who has heard a related case be allowed to influence other members of the court in making their decision.

The facts adduced in the case at bar are not the same as in *Raleigh Properties.* The testimony was not the same in the two cases. Petitioners are entitled to have their case decided on the basis of the facts and testimony which was introduced at their trial. To deny them this right is to deprive them of their property without due process of law.

It is the contention of the petitioners in this matter that Judge Bruce pre-judged the case at bar in that he had already formed an opinion that the purchasers in this land transaction were entitled to deduct the sum of $440,000.00 as interest. Having determined in the one case that this sum did represent interest, it would be logically difficult, if not impossible, for that Judge to rule that the sum was not interest in another case.

That the decision in the *Raleigh Properties* case dictated Judge Bruce's opinion in this case, can be seen from the fact that his opinion in this case consists almost completely of a quotation from his opinion in the former case.

The situation of the case at bar is analogous to a problem which frequently arises in the various federal appellate courts where by practice, if not by rule, no judge who has tried a case at the district court level ever sits on the panel which reviews that case on appeal.

For the foregoing reasons this Petition should be granted.

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